IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 27/01/2003

CORAM

THE HONOURABLE MR JUSTICE N. DHINAKAR
and
THE HONOURABLE MR JUSTICE R.BALASUBRAMANIAN

Criminal Appeal No.165 of 1999

Chandran alias Kuttipayan ... Appellant.

-Vs-

State rep. by
Inspector of Police,
Kondalampatti,
Salem District. ... Respondent

Prayer: Appeal against the judgment passed by the learned I Additional District and Sessions Judge -cum- Chief Judicial Magistrate, Salem, in S.C.No. 155 of 1997 dated: 17.2.1999.

!For Appellant : Mr.K.Doraisamy, S.C., for
M/s.Muthumani Doraisamy
Kandavadivel Doraisamy

^For Respondent : Mr.I.Subramanian
Public Prosecutor.

:JUDGMENT

(Judgment of the Court was delivered by N. DHINAKAR, J)

The accused appeals.

2. The sole appellant, who hereinafter will be referred to as "the accused", challenges his conviction and sentence. He was tried before the learned I Additional District and Sessions Judge -cum- Chief Judicial Magistrate, Salem, in S.C.NO. 155 of 1997. The allegation against him is that at 9.30 a.m. on 20.6.1996 he cut Balajothi on various parts of the body and as a result of the said cut injuries, the said Balajothi breathed her last at 11.40 a.m. at Government Mohan Kumaramangalam Hospital, Salem, where she was taken for treatment for the said injuries. The learned Sessions Judge, on convicting him, sentenced him to imprisonment for life for the offence of murder. Hence, the appeal.

3. Shorn of unnecessary details, the facts necessary to dispose of the appeal, can be briefly summarised as follows:-
P.W.1 is the stepbrother of the deceased and P.W.3 is the maternal uncle of P.W.1 and the deceased. They were residents of Karungalkadu and the father of the deceased is an agriculturist. The mother of P.W.1 died while he was young and after the death of his mother, P.W.1's father married Dhanalakshmi as his second wi fe. Balajothi was born to the said Dhanalakshmi and she was aged about 16 years during the relevant period. In the house, along with P.W.1, his parents, Balajothi, the deceased, and the wife of P.W.1 were living. They were also owning two houses and some landed property. The accused, a resident of Thachalkadu, which was at a distance of half a kilometer, and the deceased were studying at Mallur Government School. The accused was friendly towards the deceased and the fact came to the knowledge of the elders. P.W.1 advised his sister not to move with the accused in a friendly manner; but she continued her friendship with the deceased, forcing the elders to stop the education of the deceased. This was two years prior to the date of incident; but the accused was visiting the deceased very often. This was seen by P.W.1 and he advised his sister not to continue her relationship with the accused and the family members also decided to give Balajothi in marriage to a person at Salem. The marriage was, accordingly, fixed and the invitation cards were also printed. On the date of incident, the parents of the deceased were away distributing invitation cards and P.W.1 was alone standing in front of the tea shop of P.W.2 along with his wife. This was at 9.30 a.m. They were discussing about the impending marriage in the house. The deceased was sitting on the door steps of their house, which was at a distance of 50 feet from the tea shop. The accused, at that time, went to the deceased and by telling her that she has been evading to marry him for about two years and that she will not be allowed to live and marry another person, removed a knife, which he kept concealed in the shirt and started cutting her. He inflicted several cuts and her left wrist was also severed. After indiscriminately cutting Balajothi, he ran away from the place. P.Ws.1, 2 and others rushed towards the house asking the accused not to cut her; but he threatened them and went away. When they went near Balajothi, they found her in a pool of blood; but unconscious. P.W.3, Jagannathan, also reached the place and he stopped a van, which was passing by that side, in which, Balajothi was placed and removed to Government Mohan Kumaramangalam Hospital and produced before P.W.9, the Casualty Medical Officer at 9.30 a.m. P.W.9 examined Balajothi and found the following injuries:-
1.Lacerated injury 4 x 2 x 1 cm over the tip of the nose extending to lip.

2.Lacerated injury 7 x 2 x 1 cm over left side cheek.

3.Lacerated injury 6 x 2 x 4 cm over the front of the neck.

4.Traumatic amputation at left wrist level with loss of left hand.

5.Lacerated injury 8 x 4 x bone deep with exposing of bones and muscles on the left upper arm.

6.Lacerated injury 6 x 2 x 1 cm over right side back.
The doctor issued Ex.P.14, the copy of the accident register. Balajothi was

admitted as an inpatient and while she was in the ward, she breathed her last at 11.40 a.m. An intimation, Ex.P.15, was sent by P.W.10, the doctor. After the death of Balajothi, P.W.1 left the hospital, reached Mallur Police Station and gave a complaint regarding the incident to P.W.12, the Head Constable. P.W.12 reduced the said complaint into writing. The said complaint is Ex.P.1. P.W.12 registered a case in Crime No. 1017 of 1996 against the accused under Section 302 IPC. by preparing express reports. Ex.P.16 is a copy of the printed first information report. The express reports were despatched to the higher officials.

4. P.W.14, the Inspector of Police, Irumbalai Police Station, on the directions of the Deputy Superintendent of Police, took up investigation in the crime and reached Mallur Police Station at 1.30 p.m., where he was handed over a copy of the printed first information report. He left the police station along with a Police Constable and reached the scene of occurrence at 2.00 p.m. At the scene of occurrence Ex.P.2, the observation mahazar, was prepared and a rough sketch, Ex.P.17, was also drawn. The scene of occurrence was caused to be photographed. He seized the blood-stained earth and sample earth under a mahazar attested by witnesses. He, thereafter, left the scene of occurrence and reached Government Mohan Kumaramangalam Hospital, Salem, at 3.30 p.m. and in the presence of witnesses conducted inquest over the body of Balajothi and at the time of inquest, he questioned P. Ws.2, 3 and others and their statements were recorded. After the inquest, a requisition was issued to the doctor for conducting autopsy.

5. On receipt of the requisition, P.W.7, the Professor of Forensic Medicine, Government Mohan Kumaramangalam Medical College Hospital, Salem, conducted autopsy on the body of Balajothi and found the following injuries:-

1.Two cut injuries presenting as a single injury on the outer margin in "W" shape 5 cm x 10 cm in the aspect of lower 1/3rd of left arm, upper margin sharp.

2.Traumatic amputation of left hand present at the level of wrist. Margins sharp.

3.An oblique gaping cut injury present on the left side of the nose extending on to right side of upper lip. Margins sharp, angle acute. Cut injury of nasal cartilage present 5 cm x 0.5 cm x 0.5 cm.

4.A transverse gaping cut injury present on the lower part of left cheek, 5 cms x = cm x muscle deep extending forwards as a superficial incised wound up to the angle of the mouth 5 cms in length and backwards up to the left side of neck 9 cms in length.

5.An oblique gaping cut injury present on the left side of neck on its middle 3 cms x 1 cm x 2 cms cut injury of blood vessels present with fracture of C4 vertebra underneath.

6.Two superficial cut injuries present 3 cms below the chin, 3 cms x 1 cm x

0.5 cm and 3.5 cms x 0.5 cm x 0.5 cm situated 1 cm apart.

7.Another oblique gaping stab injury present on the right scapular region of back, 7 cms x 3 cms x cavity deep, through which right lung is seen, margin sharp and angles acute passing through 5th intercostal space. Cut injury of right lung on posterior aspect of lower lobe present, 3 cms x 1 cm x 1 cm. Right pleural cavity contain 100 cc fluid blood.

The doctor issued Ex.P.7, the post-mortem certificate, with his opinion that the deceased died on account of shock and haemorrhage.

6. P.W.14, continuing with his investigation, searched for the accused and arrested him at about 6.30 p.m. on 26.6.1996 and in the presence of witnesses, he was questioned. The accused gave a statement and the admissible portion is Ex.P.4. In pursuance of the admissible portion, he took the police party to a forest area and produced M.O.1, a veecharuval, and the same was seized under a mahazar. The officer also seized the blood-stained shirt, which the accused was wearing, under Form 95. He was brought to the police station and later sent to Court for remand. The officer issued a requisition to the learned Magistrate to record the statement of the witnesses under Section 164 Cr.P.C. He also sent a requisition to the Court to forward the material objects for analysis. The clothes of the deceased produced by the Constable, who was present at the time of inquest, were seized under Form 95 and further investigation was taken up by P.W.15. P.W.1 5, on taking up investigation on 25.6.1996, examined the photographer and other Police Constables as well as P.Ws.7 and 9, the two doctors. The final report was filed against the accused after the completion of investigation on 4.8.1996.

7. The accused was questioned under Section 313 of the Cr.P.C. on the incriminating circumstances. He denied all the incriminating circumstances. He did not examine any defence witness on his side; but he claimed that a false case had been foisted upon him.

8. The prosecution, to establish the cause of the death of Balajothi, examined P.W.7, the doctor, who conducted autopsy. P.W.7, in his evidence, stated that he found as many as seven injuries and that he noted them in the post-mortem certificate, Ex.P.7. He has stated that injury Nos.4 and 5 are fatal in nature and that injury Nos.2 and 7 are sufficient in the ordinary course of nature to cause death. On the medical evidence, we hold that Balajothi died on account of homicidal violence.

9. P.W.1, the brother of the deceased, and P.W.2, a person, who was running a tea stall near the scene of occurrence, were examined to establish that the accused inflicted the fatal injuries on the deceased. It is the evidence of P.W.1 that the deceased, Balajothi, who was attending school, developed friendship with the accused, which was not to the liking of the elders and therefore, she was advised not to continue her friendship with the accused. He has further stated that in spite of the advice, the deceased continued to have her friendship with the accused and therefore, she was prevented from going to school and that the elders have also started looking

for a bridegroom so that the deceased could be given in marriage and according to him, even after the deceased was prevented from going to the school, the accused was in the habit of visiting his siste r and talking with her. P.W.1 has further stated that he has advised his sister not to continue her friendship with the accused and that the marriage of the deceased was also settled and invitation cards were printed. According to him, on the date of incident, his parents were away in connection with the distribution of the invitation cards and that while he was standing in front of the tea shop of P.W.2 discussing about the impending marriage, the accused reached the place and cut the deceased, who was sitting on the door step indiscriminately. The evidence of P. W.1 is fully supported by P.W.2, an independent witness. Their evidence is also supported by P.W.3, who reached the scene of occurrence on hearing about the incident. According to him, on hearing the information about the attack on the deceased, he rushed to the scene and saw the deceased on the ground with bleeding injuries. He has also stated that at the place he noticed P.Ws.1, 2 and others standing and that according to him, he stopped a tempo van, which was passing by that side, in which the deceased was placed and that the deceased was taken and produced before P.W.9, the Casualty Medical Officer, Government Mohan Kumaramangalam Hospital. The evidence of P.Ws.1 and 2, supported by P.W.3, is also corroborated by P.W.9, the doctor, before whom the injured was produced at 11.30 a.m., that is, within two hours of the incident. On going through the evidence of P.Ws.1, 2 and 3, we find no material in favour of the accused to hold that the deceased did not suffer injuries at the hands of the accused. The occurrence had taken place in a broad day light and P.Ws.1 and 2 are natural witnesses, since the occurrence had taken place at the door steps of the house of P.W.1 and P.W.2 was having a tea stall near the said house at a distance of 15 feet. As we stated earlier, their evidence is also supported by P.W.3 and P.W.9, the doctor. When the doctor questioned as to how the deceased suffered injuries, he was informed that she was cut by a known person. The said statement given to the doctor at 11.30 a.m., therefore, indicates that the witnesses knew the identity of the assailant and the doctor was accordingly informed. The complaint was also given at Mallur Police Station by P.W.1 at 12.30 p.m. and the same reached the hands of the Magistrate by 2.30 p.m. There is no delay in laying the complaint and in the complaint, which was given at the earliest point of time, the name of the accused is found mentioned as the assailant of the deceased. We accept the prosecution version and hold that the deceased was attacked by the accused and as a result of the said attack the deceased died. We, therefore, confirm his conviction.

10. The learned counsel appearing for the appellant/ accused strenuously contends that even if the Court finds the accused guilty, he cannot be sent to jail and it is his further submission that the trial Court was not justified in sending the accused to jail and that according to him, the accused should have been sent to a Special Home in terms of Section 21(d) of the Juvenile Justice Act, 1986. The learned counsel submits that the evidence on record indicate that on the date of incident the accused has not completed 16 years of age and therefore, the trial Court ought to have sent him to Special Home, instead of sending him to jail.

11. We have heard the learned Public Prosecutor on the above

contentions and perused the evidence. P.W.7, the doctor, who conducted autopsy, examined the accused, on being referred by Judicial Magistrate No.1, Salem, to ascertain his age, though there is no evidence as to the circumstances under which the Judicial Magistrate referred the accused to the doctor for fixing the age. The evidence indicates that on being referred, the accused was examined by him on 22.7.1996 and that X-Rays were also taken. According to him, he gave Ex.P.8, certificate, with his opinion that the injured is aged about 17 years. He was cross-examined and in the cross-examination, he has stated that it is possible that on the date of examination of the accused, he would have been running 16 years. The evidence of P.W.7, therefore, is not definite as to the age of the accused. Though in chiefexamination he has stated that the accused would have completed 16 years and accordingly he issued the certificate, Ex.P.8, with his opinion that the accused was running 17, he went back on the answer given in the chief-examination and stated that it is possible that the accused should have been running 16. The evidence let in by the prosecution, therefore, does not conclusively establish that the accused has completed 16 years of age on the date of incident.

12. It is to be remembered at this stage that though the doctor claimed that the accused was examined by a Radiologist, the said Radiologist was not examined, though the X-Rays were marked as M.O.10 series. The report of the Radiologist was also not produced before Court and in view of the vacillating answer of the doctor, it is difficult for the Court to come to a definite conclusion that the accused has completed 16 years of age on the date of incident.

13. In A.I.R.1982 S.C.Pg.1297 (Jaya Mala Vs. Home Secretary, Government of Jammu and Kashmir & Others) the Supreme Court was considering the evidentiary value of the evidence of the Doctor as to the age of a person based on radiological test. The detenu in that case came to be detained on 18.10.1981 and the expert's report was dated 03.05.19 82. The case of the detenu was that, she was a minor aged about 17 years at the time of arrest and detention and it was contended that a minor cannot be detained. In that context only, the Supreme Court held as follows:

"It is notorious and one can take judicial notice that the margin of error in age ascertained by radiological examination is two years on either side." (Emphasis supplied)

14. A Division Bench of this Court, in SHANMUGAM -vs- STATE (1984 L.W. (Crl.) 12), after taking a bird's eye view of the law on the subject and after referring to the judgment of the Supreme Court cited supra, held that the determination of age on the basis of radiological examination can only be an approximate factor and it cannot be taken as a decisive and incontrovertible feature. The Division Bench, after referring to Modis Medical Jurisprudence, observed that blind and mechanical view regarding the age of a person cannot be adopted solely on the basis of the evidence afforded by the radiological examination and Courts further take judicial notice of the fact that the evidence afforded by radiological examination, though may be an useful guiding factor for determining the age of a person, it is not

conclusive and incontrovertible in nature and it is subject to a margin of error.

15. In RAMDEO CHAUHAN -vs- STATE OF ASSAM (2001 SUPREME COURT CASES (Crl) 915, the convicted accused was seeking review of it's earlier judgment against him confirming the death sentence awarded by the trial court and affirmed by the High Court. In the review petition the accused took a new plea stating that at the time of occurrence, he was aged below 16 years and therefore he should have been tried by a juvenile court alone. The Supreme Court found that at all previous stages, the accused never raised a plea based on he being a juvenile on the relevant date. In this judgment, the Apex Court referred to the margin of error on the fixation of age by radiologist, as held in Jaya Mala's Case and on facts in that case, found that the accused was not a juvenile. In Paragraph 21 of the said judgment it is found stated as follows:

The aforesaid case (Jaya Mala's case) is of no help to the accused inasmuch as in that case the court was dealing with the age of a detenu taken in preventive custody and was not determining the extent of sentence to be awarded upon conviction of offence. Otherwise also, even if the observations made in the aforesaid judgment are taken note of, it does not help the accused in any case. The Doctor has opined the age of the accused to be admittedly more than 20 years and less than 25 years. The statement of the Doctor is no more than an opinion, the court has to base it's conclusions upon all the facts and circumstances disclosed on examining of the physical features of the person whose age is in question, in conjunction with such oral testimony as may be available. An X-Ray ossification test may provide a surer basis for determining the age of an individual than the opinion of a medical expert but it can by no means be so infallible and accurate a test as to indicate the exact date of birth of the person concerned. Too much reliance cannot be placed upon textbooks on medical jurisprudence and toxicology while determining the age of an accused. In this vast country with varied latitudes, heights, environment, vegetation and nutrition, height and weight cannot be expected to be uniform.

In the said judgment, the Supreme Court also extracted the relevant passage from Jhala & Raju's Medical Jurisprudence and it is as follows:

"If ossification test is done for a single bone the error may be two years either way. But if the test is done for multiple joints with overlapping age of fusion the margin of error may be reduced. Sometimes this margin is reduced to six months on either side."

16. There is yet another judgment of the Supreme Court reported in 2 002 (2) S.C.C.Pg.287 (Rajinder Chandra Vs. State of Chattisgarh). In that case the accused contented that on the date of his arrest on 2 7.02.1997, for the offence of murder, he was a juvenile below the age of 16 years and therefore entitled to the benefit of the Juvenile Justice Act 1986. The learned Magistrate in the Court of Sessions found that the accused not to be a juvenile. The revision filed by the accused was allowed by the High Court holding that the accused was a juvenile. The father of the victim in that

case was before the Supreme Court contending that the order of the High Court was erroneous. The Supreme Court while dealing with that situation, held as follows:

"5. It is true that the age of the accused is just on the border of 16 years on the date of the offence and arrest, he was less than 16 years by a few months only. In Arnit Das Vs. State of Bihar this court has, on a review of judicial opinion, held that while dealing with the question of determination of the age of the accused for the purpose of finding out whether he is a juvenile or not, a hyper-technical approach should not be adopted while appreciating the evidence adduced on behalf of the accused in support of the plea that he was a juvenile and if two views may be possible on the said evidence, the court should lean in favour of holding the accused to be a juvenile in borderline cases. The law so laid down by this court, squarely applies to the facts of the present case."

17. Therefore, the law on the subject shows that if there is a doubt as regards the age of the accused, the Court should lean in favour of the accused. The facts, which we have already extracted, s how that the doctor was not definite about the age of the accused, since in cross-examination, he has admitted that on the date of incident, the accused could have been running 16, which means that there is no conclusive evidence that on the date of occurrence he has completed 16 years of age. The accused was questioned under Section 313 Cr.P.C. on 9.10.1998 and he had given his age as 16 years on that day. If so, on 20.6.1996, the date on which the occurrence had taken place, he should have been less than 16 years of age. This, coupled with the admission of the doctor in cross-examination that the accused was running 16 years of age, if taken into consideration, then the accused is to be treated only as a juvenile on the date of occurrence. On this established position, the Juvenile Justice Act, 1986 (hereinafter referred to as the Act) comes into operation. Under clause (d) of section 21, the court has the power to send a convicted juvenile accused to a special home in the case of a boy over 14 years of age for a period of not less than 3 years. Under the same clause, in the case of other juvenile, the period of detention in the special home shall be in force until he ceases to be a juvenile. In this case there is no material to show that the accused is less than 14 years and therefore clause (i) of clause (d) of section 21 of the Act would stand attracted, which means that, he shall be detained for a period not less than three years. Under the second proviso to sub clause (d) to section 21 of the Act, the juvenile court has the power, for reasons to be recorded, to extend the period of such stay but in no case the period of stay shall extend beyond the time when the juvenile attains the age of 18 years in the case of a boy. Under this second proviso, the court's power to extend the period of detention of a juvenile in the special home is limited upto the age of 18 years in the case of a boy. In this case admittedly the juvenile accused has passed the age of 18 years and therefore he cannot be detained even in the special prison as on date.

18. In KARUPPAYEE -vs- STATE (1997 CRL.L.J.1627), a Division Bench of this Court, while considering a similar piquant situation held that the Court cannot direct a juvenile to return to the jail after serving the period of detention in Borstal School and the only course left is to release him though

he is convicted for the offence with which he was charged. This view of the Division Bench found approval with the Supreme Court in PRADEEP KUMAR -vs STATE OF U.P. (1995 SUPP. (4) SUPREME COURT CASES 419.

19. On the discussion made above, while we confirm the conviction of the accused, we direct his release from the prison and we are also unable to send him to Special Home as he has completed 18 years as on today. The appeal is, therefore, disposed off on the lines indicated above. The accused shall be released forthwith from the prison.

Index:Yes
Website/Yes

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To,

1.The I Additional Sessions Judge, Salem.
2.-do- through the Principal Sessions Judge, Salem.
3.The Inspector of Police, Kondalampatti Police Station, Salem District.
4.The Superintendent, Central Prison, Coimbatore.
5.The Collector, Salem District.
6.The Director General of Police, Madras.
7.The Public Prosecutor, High Court, Madras.